No. 1276

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CHARLES ELMORE CROPLEY
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

MAY DEPARTMENT STORES COMPANY, a Corporation,
Petitioner,

vs.

JOHN REYNOLDS, JR., by JOHN REYNOLDS, Next Friend,
Respondent.

PETITION FOR WRIT OF CERTIORARI
and
BRIEF IN SUPPORT THEREOF.

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INDEX.

Page

Petition for writ of certiorari..... 1–7

Statement of the matters involved..... 1
The facts 3
Questions presented 2
Reasons for granting the writ..... 6

Brief in support of petition for writ of certiorari.....8–18

Opinion below 8
Jurisdiction 8
Statement of the case..... 8
Specification of errors..... 9
Summary of argument 9
Argument 11
Conclusion 18

Cases Cited.

Annen v. Jackson, 340 Mo. 331, 100 S. W. (2d) 872... 15

Butz v. Cavanaugh, 137 Mo. 503, 38 S. W. 1104..... 14

Erie R. R. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. Rep. 817, 82 Law. Ed. 1188..... 8

Gardner v. Turk, 343 Mo. 899, l. c. 914, 123 S. W. (2d) 158 12

Graves v. May Department Stores Company, 153 S. W. (2d) 778 (Mo. App.).....10, 15

Horvath v. Chestnut Street Realty Co. (St. L. C. of A.), 144 S. W. (2d) 165..... 14

Jablonski v. May Department Stores Co., 154 S. W. (2d) 786 (Mo. App.).....10, 15, 16

Kelly v. Benas, 217 Mo. 1, 116 S. W. 557..... 11

Klaxon Company v. Stentor Electric Mfg. Co., 313 U. S. 487, 85 L. Ed. 1477, 61 S. Ct. 1020..... 8

Mann v. Pullian, 127 S. W. (2d), l. c. 426, 344 Mo. 543.. 17

Murray v. D'Oench Co. (Mo. Sup.), 147 S. W. (2d) 623 14
Paubel v. Hitz, 339 Mo. 274, 96 S. W. (2d) 369..... 14
Petigo v. Roseberry, 340 Mo. 724, 102 S. W. (2d) 600. 15
Reddy v. Joseph Garavelli, Inc. (Mo. App.), 102 S. W. (2d) 734 14
Rose v. Thompson, 346 Mo. 395, 141 S. W. (2d) 824... 15
Six Companies of Cal. v. Joint Highway Dist. No. 13, 311 U. S. 180, 85 L. Ed. 114, 61 S. Ct. 186..... 8
Vogt v. Wurmb, 318 Mo. 471, 300 S. W. 278..... 13
West v. American Telephone & Telegraph Co., 311 U. S. 223, 85 L. Ed. 139, 61 S. Ct. 179..... 8

Statutes Cited.

Section 240 (a) of the Judicial Code as amended February 13, 1925 (Chapter 229, Section 1), 43 Stat. 938; Section 1217 U. S. Compiled Statutes Cum. Supp. 1925, now being Section 347 (a), Title 28, U. S. C. A.. 8

Textbook Cited.

20 Ruling Case Law 56, par. 52..... 13

IN THE

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Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Harlan F. Stone, Chief Justice of the Supreme Court of the United States of America, and the Associate Justices:

The petitioner, May Department Stores Company, a corporation, respectfully shows to the Honorable Court:

STATEMENT OF THE MATTERS INVOLVED.

This is a suit for damages for personal injuries sustained by respondent, a 4-year-old boy, resulting after he had fallen upon an escalator in petitioner's store while he was riding thereon in the care and control of his mother. The suit was instituted in the Circuit Court of the City of St. Louis, Missouri (R. p. 5); on account of diversity of citi-

zenship it was removed to the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri (R. p. 14), and from a verdict and judgment in favor of petitioner, directed by the Court, respondent appealed to the United States Circuit Court of Appeals for the Eighth Circuit, which Court reversed the judgment of the said District Court (R. p. 77). Petition for rehearing was denied (R. p. 87), and petitioner seeks to bring the case here by this petition for writ of certiorari.

I. The Issue Presented.

The issue for decision is whether, under the law of Missouri, with respect to a "standard" instrumentality, such as an escalator (or a revolving door, or an elevator, or any other device commonly employed for use by patrons), and where the instrumentality is so constructed that a small child may possibly be injured thereby, if it should fall, a store owner may be held negligent in connection with a child's injuries suffered while accompanied by a parent familiar with such instrumentality, either (1) for failing to give directions or assistance in connection with the use of such instrumentality, or (2) in the absence of such directions or assistance, for permitting the use of the instrumentality.

The Court of Appeals in this case found that the steps and the handrails of the escalator, due to their height and spacing, were "adapted primarily to adult use," and were not "capable of use by plaintiff," and that by reason of this construction there was a question whether the escalator "presented anticipatable dangers in its use by small children" (R. p. 75), so as to require either an attendant "to assist, caution or give directions to him or to anyone accompanying him," or in the absence thereof that "the use of the escalator might not soundly to have been open to infant invitees" (R. p. 76).

It is the position of petitioner that the decision of the Court of Appeals in ruling that there was a submissible case for a jury on this issue is in conflict with controlling Missouri decisions applicable to the principles involved.

II. The Facts and Proceedings.

Petitioner operates a large department store in the City of St. Louis under the trade name of Famous-Barr Company, and in said store has escalators for the purpose of transporting its business invitees from floor to floor. Respondent's mother had been in petitioner's store upon numerous occasions prior to the date upon which respondent was injured, had used the escalator in question a number of times and was familiar with it (R. pp. 28, 29). She knew that it had been installed to displace an older type of escalator; knew of the height of the steps and was generally familiar with the construction of the escalator. She also knew that as the steps approached the top the height or distance from one step to the other decreased until the steps gradually leveled off (R. pp. 29, 31). On the 17th day of February, 1938, when respondent was 4 years of age, his mother took him to petitioner's store and upon an escalator going to the second floor. She stood upon one of the steps with respondent on the right side, holding his left hand with her right hand. When the step of the escalator upon which respondent and his mother were standing neared the top, and when that step was the second step from the top, and while she was holding him by the hand and was in the act of putting her other hand under his arm and while she was holding onto him, he got away from her hold and fell forward (R. pp. 23, 30). His hands were outstretched before him in such a way that the third, or ring finger, on the right hand was caught in one of the apertures where the tread of the step entered in the comb-plate and was crushed off (R. pp. 33, 34, 36), so that

but a small stump remained with the skin torn away. There was also a deep laceration on the second finger (R. p. 33).

The escalator was so constructed that the teeth of the comb-plate were nine thirty-seconds of an inch in width and had a space of nineteen thirty-seconds of an inch between them. There was a space of over a quarter of an inch between the ends of the teeth or grooves in the moving steps as they passed under the comb-plate. The step, handrails and parts were designed and constructed to accommodate adult persons who would enter the store as business invitees. There were no attendants at either end.

The case was tried on respondent's complaint charging, in substance, that petitioner was negligent in that it knew, or by the exercise of lawful care could have known, that gaps and openings at the upper end of the escalator between the prongs of the comb-plate and moving steps constituted a danger, menace and peril to young children using the escalator, and that the height of the steps and handrails above the steps and the distance between the handrails were not designed or adapted for the safety and needs of small children, and that defendant knew, or should have known, that while said escalator was in such a dangerous condition it was negligence to invite the use thereof by small children. It was also charged that defendant knew, or should have known, that unless it provided some adequate safeguard to protect small children from dangers to them in using said escalator, it was dangerous and perilous for small children to ride thereon, and that, notwithstanding, petitioner did invite the use of the escalator by small children.

At the conclusion of all of the evidence the trial court directed a verdict in favor of petitioner and judgment was accordingly entered (R. p. 66) on October 14, 1940. On

October 17, 1940, respondent's motion for a new trial was filed (R. p. 67). On December 16, 1940, respondent's said motion for a new trial was overruled. From this judgment the respondent appealed to the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

On April 8, 1942, the United States Circuit Court of Appeals for the Eighth Circuit filed its opinion reversing the said judgment and remanding the cause to the said District Court for a new trial.

In the trial court and in the Circuit Court of Appeals respondent contended that petitioner was negligent in installing an escalator not constructed for and adapted to the use of small children and in permitting small children to use said escalator, which respondent contended was dangerous when used by small children. Petitioner contended that the escalator in question was suitable for the use of such persons as would be reasonably contemplated to enter, and transact business with, department stores; that it was not reasonable to anticipate that children of tender years unaccompanied by parents or attendants would enter department stores; that it was not the presence of the child upon the escalator which caused said injuries, but that they were caused by the child's escape from the control and care of his mother, an occurrence over which petitioner had no control.

On the 21st day of April, 1942, petitioner filed a petition for a rehearing in said Circuit Court of Appeals, wherein it pointed out and complained that the opinion of said Circuit Court of Appeals was erroneous, in that it held that under Missouri law a question of negligence for a jury as to the proximate cause of an injury is presented when a store owner permits a child of tender years, attended by and in charge of a parent, to use an instrumentality of the store which is so constructed as to pos-

sibly permit injury to such child should he make some movement or be so handled by his parent as to cause him to fall and thereby to create a hazard of injury, and that Missouri decisions do not announce any principle of law to support such holding and that such holding conflicted with controlling Missouri decisions. In its said petition for a rehearing petitioner cited cases and decisions of Missouri appellate courts, including the Supreme Court of Missouri, agreeing with petitioner's contention (R. p. 79).

The said petition for rehearing was denied by said Circuit Court of Appeals on the 27th day of April, 1942 (R. p. 87).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The one paramount and impelling reason why a review of the decision of the Court of Appeals should here be accorded is: That decision has so ruled an important question of negligence law, touching upon the relationship of a store-owner and its business invitees, as to depart radically from and to conflict with applicable controlling decisions of the state courts in Missouri.

Briefly to amplify this reason, attention is drawn to the following conflicts between the decision here sought to be reviewed and several leading Missouri decisions:

(1) In holding in effect that it was for a jury to say whether the petitioner was negligent in failing to assist, caution, or give directions to the child or to its parent with respect to the use of the escalator, such opinion is in direct conflict with state decisions which hold that there is no duty to warn where the particular condition which might cause injury is open and obvious;

(2) In holding in effect that it was for a jury to say whether the store-owner was negligent, absent the giving of such warning, in permitting the use of the escalator by a small child when accompanied by a parent, such opinion conflicts with applicable Missouri decisions which hold that the giving of such permission may not be considered as the active, efficient and proximate cause of an injury suffered under comparable circumstances.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 11,932, John Reynolds, Jr., by John Reynolds, next friend, appellant, v. May Department Stores Company, a corporation; appellee, and that the said judgment of the Circuit Court of Appeals for the Eighth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

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a corporation,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION BELOW.

The opinion of the Court of Appeals appears at pages 74 to 77 of the record and is not yet reported.

II.

JURISDICTION.

The date of the judgment of the trial court is the 14th day of October, 1940 (R. p. 66). The date of the judgment of the Circuit Court of Appeals to be reviewed is April 8, 1942 (R. p. 77). The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240 (a) of the Judicial Code as amended February 13, 1925 (Chapter 229, Section 1), 43 Stat. 938; Section 1217 U. S. Compiled Statutes Cum. Supp. 1925, now being Section 347 (a), Title 28, U. S. C. A.

The cases believed to sustain the jurisdiction of this Court are:

Erie R. R. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. Rep. 817, 82 Law. Ed. 1188;

West v. American Telephone & Telegraph Co., 311 U. S. 223, 85 L. Ed. 139, 61 S. Ct. 179;

Klaxon Company v. Stentor Electric Mfg. Co., 313 U. S. 487, 85 L. Ed. 1477, 61 S. Ct. 1020;

Six Companies of Cal. v. Joint Highway Dist. No. 13, 311 U. S. 180, 85 L. Ed. 114, 61 S. Ct. 186.

III.

STATEMENT OF THE CASE.

In the petition, at pages 1 to 6, is a full statement of the case so far as the law and the facts are material to a consideration of the questions here presented. In the interest of brevity this statement is not repeated.

IV.

SPECIFICATIONS OF ERROR.

The Circuit Court of Appeals for the Eighth Circuit erred:

1. In holding that there was a question for jury as to whether petitioner exercised proper care for respondent's safety when it invited him to use the escalator, with its existing mechanical construction, without having attendants at the ends of the escalator to assist or give directions to respondent or person accompanying him as to the proper position to take on the escalator and the preserving of his balance and the avoiding of any effort to press forward as the escalator neared the second floor; and

2. In holding that where evidence suggested that other particular measures of protection might possibly be taken or that the evidence was such as to permit a sound doubt as to whether other reasonable measures were possible, there was a question for a jury as to whether or not infant had at all to be allowed to be exposed to the hazard.

V.

SUMMARY OF ARGUMENT.

1. The escalator in question was purchased from and installed by a manufacturer and was designed and constructed to accommodate adult persons, or such persons as petitioner, store owner, would reasonably contemplate entering the premises as business invitees. A store owner should not be expected to anticipate the presence of children of tender years in store, unaccompanied by parents or attendants. In supplying instrumentalities for the accommodation of business invitees and in carrying on business generally, the law does not require greater care of store owner to children than to others, unless the attrac-

tive nuisance doctrine is applicable. Store owner has right to assume that if a child incapable of anticipating, appreciating or guarding against danger, enters the premises in control of parent, that parent having custody and authority over child will prevent him from going into danger, which because of his immaturity he may not fully know and appreciate.

2. The escalator in question was not a complicated device. The parent accompanying respondent and exercising control over him was familiar with it and its movements and construction, and the danger to respondent from a fall upon it, if such child escaped from the mother's control, was as well known to the mother as to petitioner. Therefore, under Missouri law there was no obligation upon petitioner to warn her in regard to matters with which she was familiar and which were as well known to her as to petitioner.

3. Respondent's fall and resultant injury were not caused by any conduct upon the part of petitioner. The active, efficient and proximate cause of said fall and resultant injury was not the presence of respondent upon the escalator in question, but his escape from the control and care of his mother. Therefore, there was no right of recovery under Missouri law against petitioner.

4. The cases of Graves v. May Department Stores Company, 153 S. W. (2d) 778 (Mo. App.), and Jablonski v. May Department Stores Co., 153 S. W. (2d) 786 (Mo. App.), which the Court of Appeals said compel the holding in the case here, are distinguishable from the case here and furnish no authority for the opinion of the Circuit Court of Appeals.

ARGUMENT.

The evidence in this case shows that the escalator in question was purchased from, and installed by, a manufacturer and was designed and constructed to accommodate adult persons, or, it might be better said, such persons as the store owner would reasonably contemplate as business invitees. In this connection it might be well to point out that a store owner should not be expected to contemplate that children of tender years or of the age of respondent would come upon the premises unaccompanied by a parent or attendant. With this in mind, the duty of the store owner, in supplying escalators and similar instrumentalities for the accommodation of its business invitees and in carrying on its business generally, does not require greater care to children than others, unless the attractive nuisance doctrine is applicable.

In **Kelly v. Benas**, 217 Mo. 1, 116 S. W. 557, the Court said:

> "We feel, usually, more indignation at wrongs done to children than at wrongs done to others. But the law has not usually given them civil remedies on any such basis. Nor does it usually, if ever, impose any duties on strangers to them, resting entirely on the fact that they are children. Those who have any special dealings with them, as parents, teachers, and employers, incur obligations appropriate to their relations, and differing from those incurred towards others in proportion to the necessity of care and protection and the risk of injury. But those who have no such relations with them are not liable for negligence in carrying on their own business, beyond what would be their liablity to others, as well as children who are equally free from blame."

While we do not contend that any negligence on the part of the mother would be imputable to the child so as to

relieve petitioner from liability if it was negligent, we do contend that under Missouri decisions there is a recognition of the right of one in the position of petitioner in the case here to anticipate that the mother, who took respondent upon the escalator under the circumstances existing, would properly protect him against such risk of an injury as might be entailed if he should escape from her control and fall.

In **Gardner v. Turk**, 343 Mo. 899, l. c. 914, 123 S. W. (2d) 158, the Court said:

> "If, then, a child is not capable of anticipating, appreciating and of guarding against danger as would be a person of more mature years, judgment and experience, it would seem by parity of reasoning that those having custody and authority over such child and whose duty it is to care for and safeguard him should, so far as is reasonably possible, prevent him from going into a danger known to them, but which, because of his immaturity, he may not fully know and appreciate."

The escalator was not a complicated device, the width and height of the steps and the movements thereof, the height of the handrail, the width of the cleats and space between them, the comb-plate and apertures thereof, the width of the space between the teeth of the comb-plate through which the treads of the steps passed, were all visible, open and obvious; the movement of the steps, the fact that the distance between one and the other decreased as they neared the top, the fact that they leveled off before the treads passed between the teeth of the comb-plate, all were also visible, open and obvious. Respondent's mother, who took him upon the escalator, had used it upon numerous occasions prior to the accident, was familiar with it and knew of its works and workings. There is no evidence that the position of respondent and his mother upon the

step was not the proper position. Under these circumstances there was no obligation under the Missouri law to warn respondent's mother, who had the care and control of him, while upon the escalator. Therefore, there was no duty upon petitioner to warn or caution respondent, or his mother who accompanied him, as to the position to take while upon the escalator, or as to the preserving of his balance, or as to pressing forward as the escalator neared the second floor, as mentioned in the opinion of the Court of Appeals. Furthermore, the applicable Missouri decisions require no duty to warn of dangers which are open and obvious and which are as well known to the invitee as to the owner or occupant of the premises.

In the leading case of Vogt v. Wurmb, 318 Mo. 471, 300 S. W. 278, the duty of an owner of premises to those coming thereon at his invitation, using due care, is announced as follows:

> "The owner of lands is liable in damages to those coming thereon, using due care, at his invitation or inducement, express or implied, or on any business to be transacted with or permitted by him, for an injury occasioned by the unsafe condition of the premises, which is known to him and not to them, and which he has suffered negligently to exist, and of which they have received no notice."

In the opinion in the same case, quoting from 20 Ruling Case Law 56, par. 52, it is said:

> "The mere ownership of land or buildings does not render one liable for injuries sustained by persons who have entered thereon or therein; the owner is not an insurer of such persons, even when he has invited them to enter. Nor is there any presumption of negligence on the part of an owner or occupier merely upon a showing that an injury has been sustained by one while rightfully upon the premises. The true ground of liability is the proprietor's superior knowl-

edge of the perilous instrumentality and the danger therefrom to persons going upon the property. It is when the perilous instrumentality is known to the owner or occupant and not known to the person injured that a recovery is permitted. . . . And, hence, there is no liability for injuries from dangers that are obvious, or as well known to the person injured as to the owner or occupant."

See, also:

Horvath v. Chestnut Street Realty Co. (St. L. C. of A.), 144 S. W. (2d) 165;
Paubel v. Hitz, 339 Mo. 274, 96 S. W. (2d) 369;
Butz v. Cavanaugh, 137 Mo. 503, 38 S. W. 1104;
Reddy v. Joseph Garavelli, Inc. (Mo. App.), 102 S. W. (2d) 734;
Murray v. D'Oench Co. (Mo. Sup.), 147 S. W. (2d) 623.

In the case of Murray v. D'Oench, supra, the Supreme Court of Missouri said:

"We have held that 'the true ground of liability (of an owner or occupant of lands to an invitee) is the proprietor's superior knowledge' of an unsafe condition and its dangers. * * * We have, therefore, ruled where the condition is so open and obvious that it is as apparent to the invitee as to the owner, or where the condition is actually known to the invitee, that there is no liability; otherwise the proprietor would be in effect an insurer."

Surely the dangers which might result from a fall if the child escaped from the mother's care and control were as well known to the mother as to the petitioner.

The evidence shows clearly that respondent's fall and resultant injury were not caused by any conduct on the part of petitioner nor on account of the method and manner of the operation of the escalator. The evidence upon

the cause is that which came from his mother; no other witness saw him fall; his mother's testimony was that she was holding him by the hand and went to put her other hand under his arm; she held onto his hand all the time; that he got away from her hold and fell forward, just as the escalator was nearing the top and when respondent was on the second step from the top. This testimony points to but one cause of the fall and resultant injury, and that was his escape from the control and care of his mother. That was the active, efficient and proximate cause. The mere fact that he was present upon the escalator in the care, custody and control of his mother was a remote cause. Therefore, there could be no recovery under the applicable law of Missouri.

> Annen v. Jackson, 340 Mo. 331, 100 S. W. (2d) 872;
> Petigo v. Roseberry, 340 Mo. 724, 102 S. W. (2d) 600;
> Rose v. Thompson, 346 Mo. 395, 141 S. W. (2d) 824.

The Court of Appeals in its opinion recognizes the cases of Graves v. May Department Stores Co. (Mo. App.), 153 S. W. (2d) 778, and Jablonski v. May Department Stores Co. (Mo. App.), 153 S. W. (2d) 786, as announcing a principle of law to support its holdings, for in the opinion the Court states that its conclusion is further compelled by the holding and implications in said cases which have been decided by the Missouri courts since the present case was tried in the District Court. The facts in the Graves and Jablonski cases are in no way comparable to those here. In the Graves case a child of tender years was in petitioner's store with his mother. The mother was busy making a purchase in one of the departments when the child wandered away and was attracted by, and lured to, the escalator. He saw a piece of paper bouncing around on the tread of the steps where it entered the comb-plate, stooped down, and, in some way, while tampering with the paper or the moving steps, caused his fingers to be

caught in an aperture and injured. There the child was not in the care and control of his mother while riding upon an escalator, as was the respondent here. There the Court said:

> "The real and final test of negligence or no negligence in this case is whether or not the escalator in question was an instrumentality attractive and dangerous to a child of tender years to such an extent that a reasonably prudent person, exercising ordinary care to keep his store and the facilities therein necessarily used by his invitees in a reasonably safe condition for their use, would have anticipated that a child of tender years might be attracted to the escalator and injured between the step and the comb plate, and in the exercise of such care would have provided a guard to protect the child from such injury."

While the attractive nuisance doctrine was not strictly applicable in that case because the child was not a trespasser and was not lured upon the premises by the instrumentality which was left unguarded, the applicable principles announced in the attractive nuisance doctrine were borrowed from that doctrine and applied to the child who was rightfully upon the premises, and, after being thereon, strayed away from his mother and then was attracted by, and lured to, the instrumentality which was not guarded.

The facts in the Jablonski case were practically identical to those in the Graves case, and while we concede that the principles announced in those cases are authority for submitting a question as to whether or not a store owner was negligent in not providing a guard or attendant to prevent unaccompanied children of tender years from getting on an escalator, there is certainly no principle announced in said decisions which would authorize a holding that there was a question of negligence presented for the consideration of a jury where a child was

taken upon an escalator by the parent and was under the exclusive care and control of the parent, and on account of escaping from such control and care fell and was injured.

If the opinion of the Court of Appeals is permitted to stand, it is petitioner's belief that it is not confined to an injury sustained on account of fingers getting into the apertures of the comb plate of an escalator, but the principles announced in the opinion are such as to authorize the submission of a case for the consideration of a jury whenever a child of tender years escapes from the control of its parent while on an escalator, elevator, open stairway, or passing through revolving doors and falls and suffers an injury such as a fracture of a skull, or any injury about the body, or a fracture of an arm or limb, and such principles are clearly not supported by the applicable Missouri law here brought to the Court's attention.

In Mann v. Pullian, 127 S. W. (2d), l. c. 426, 344 Mo. 543, it is said:

> " 'The proper inquiry is not whether the accident might have been avoided if the one charged with negligence had anticipated its occurrence, but whether, taking the circumstances as they then existed, he was negligent in failing to anticipate and provide against the occurrence.'
>
> "Can it be said that a reasonable person should have foreseen that some one might sustain an injury as plaintiff did in this case? We think not. If not, then respondent cannot be held liable under the law of negligence. * * *
>
> " 'Negligence is not determined by what any one looking back after the accident sees should have been done, but by what the ordinarily careful man under the circumstances existing before the accident would foresee and deem should be done.' "

CONCLUSION.

Inasmuch as the said Court of Appeals has failed to follow the applicable Missouri decisions, it is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory power by granting a writ of certiorari and thereafter reviewing and reversing the judgment and decision of said Court of Appeals.

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No. 111

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CHARLES ELMORE CROPLEY
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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

Page

Brief in opposition to petition for writ of certiorari... 1-3

Cases Cited.

Graves v. May Department Stores Company, 153 S. W. (2nd) 778 (Mo. App.)..... 2

Jablonsky v. May Department Stores Company, 153 S. W. (2nd) 786 (Mo. App.)..... 2

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

For several years respondent has been seeking to have a jury decide whether petitioner exercised the degree of care the law imposed upon it for the safety of an infant when it invited him to use an escalator having a mechanical construction which permitted the catching and mangling of his fingers and having lack of usable supportive handrails, and having unsupervised operation; and whether this lack of care was not the proximate cause of plaintiff's serious injury. Petitioner's desire and present purpose is to keep any jury from deciding these questions. That is why it now asks certiorari.

If the question of petitioner's negligence is one about which reasonable minds may differ, the question should be submitted to a jury. Petitioner, therefore, is forced to claim that on the question involved, reasonable minds could not differ. But the minds of the learned Judges of the Circuit Court of Appeals for the Eighth Circuit unanimously differed with the petitioner's professed view. Therefore, to say the best for petitioner, reasonable minds can and do differ on this question of negligence, and the decision is for a jury.

II.

The decision of the Circuit Court of Appeals is in entire harmony with the applicable local decisions. The opinion cites the cases of Graves v. May Department Stores Company, 153 S. W. (2nd) 778 (Mo. App.) and Jablonsky v. May Department Stores Company, 153 S. W. (2nd) 786 (Mo. App.). In those cases are cited other Missouri authorities showing they are in complete accord with the settled and traditional Missouri law. The opinion below was not based on the Graves and Jablonsky cases alone. It states that its decision was "further compelled" by those cases.

Petitioner says it believes the Graves and Jablonsky cases are distinguishable from the instant case. That would be an amazing feat of legal legerdemain. In all three cases (the Graves and Jablonsky cases and this one) the escalators are identical in pattern, measurements and details of construction. They are companion escalators which were all installed at the same time by the same manufacturer. In all three cases this same petitioner has been sued for injuries to the hands of small children, and each of the three children was hurt because of the same defect in this type of escalator. The Missouri court has held that it is a menace to children and that its operation presents a ques-

tion of negligence for a jury. The only distinction possible is that the petitioner owed a higher degree of care to this respondent because he was an invitee passenger, whereas the two other children were not. The cases are more than in point—they are decisive.

The petition for certiorari should be denied.

Respectfully submitted,

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